

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

CASE NO. ICTR-05-86-S
CHAMBER III

THE PROSECUTOR
OF THE TRIBUNAL
v.
MICHEL BAGARAGAZA

WEDNESDAY, 4 NOVEMBER 2009
1405H
SENTENCING HEARING

Before the Judges:

Vagn Jøensen, Presiding
Bakhtiyar Tuzmukhamedov
Gberdao Gustave Kam

For the Registry:

Ms. Felicité A. Talon
Mr. John Tumati

For the Prosecution:

Mr. Wallace Kapaya
Mr. Patrick Gabaake
Mr. Iskandar Ismail

For the Accused Michel Bagaragaza:

Mr. Geert-Jan Alexander Knoops
Mr. Wayne Jordash

Court Reporters:

Ms. Kelly Surina
Ms. Tanya West

I N D E X

EXHIBIT

Exhibit No. D. 6 4

P R O C E E D I N G S

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MR. PRESIDENT:

Good afternoon, everybody.

Madam Registrar, will you open the proceedings, please.

MS. TALON:

Good afternoon, Mr. President. Trial Chamber III of the ICTR for Rwanda, composed of Judge Vagn Jøensen, presiding, Judge Bakhtiyar Tuzmukhamedov, and Judge Gberdao Gustave Kam, is now sitting in open session today, the 4th of November 2009, for the commencement of the sentencing hearing in the matter of the Prosecutor versus Michel Bagaragaza in a public session, Case No. ICTR-2005-86-S.

Thank you, Mr. President.

MR. PRESIDENT:

Thank you, Madam Registrar.

The appearances are the same as yesterday?

MR. KNOOPS:

Yes, Your Honour.

MR. PRESIDENT:

Thank you. We will first deliver our oral ruling on the issues concerning admission of 92 *bis* statements that were discussed yesterday.

The ruling reads as follows: The Defence seeks admission into evidence of 12 witness statements in lieu of oral testimony pursuant to Rule 92 *bis* of the Rules of Procedures and Evidence. The statements have been signed by the witnesses but not certified in accordance with Sub-Rule (B).

The Prosecution stipulates to the authenticity of the statements.

Under the circumstances, the Chamber accepts that the Prosecution stipulation may substitute certification pursuant to Sub-Rule (B).

The Prosecution, however, submits that ten of the statements (Witnesses D2 to D5, D7 to D11 and 13) should only be admitted with the exclusion of portions which deal with a confrontation between Michel Bagaragaza and the *Interahamwe* and with respect to Witness D13, further a portion which deals with the *Interahamwe's* alleged appropriation of tea factory resources without the consent of Bagaragaza.

1 The Prosecution argues that the said portions are inconsistent with Bagaragaza's guilty plea and/or
2 relates to the acts and conduct of the Accused and/or negate the mental element of the offence of
3 the Accused.

4
5 The Defence disputes that the said portions are inconsistent with the guilty plea or negate the *mens rea*
6 to which Bagaragaza has confessed. They should be admissible because they only relate to his
7 motivation for his actions and the surrounding circumstances without affecting the facts to which he has
8 pleaded guilty.

9
10 The Chamber notes that the portion of Witness D13's statement which deals with the *Interahamwe's*
11 alleged appropriation of tea factory resources without the consent of Bagaragaza is clearly inconsistent
12 with the guilty pleas and, therefore, inadmissible at this stage of the proceedings.

13
14 With respect to the other portions, the Chamber notes that Bagaragaza has pleaded guilty to
15 complicity in genocide which means that he acknowledges having been aware of the special
16 genocidal intent of the planners and principal perpetrators of the genocidal acts, without himself sharing
17 their special intent.

18
19 The wording of Bagaragaza's guilty plea, that he acted "knowingly", can only be understood as a
20 reference to the said *mens rea* and not as a waiver to argue with respect to assessment of the gravity
21 of his offence or as a mitigating circumstance that there were special circumstances which motivated
22 him to act as he did.

23
24 However, evidence in the form of written witness statements can only be admitted if it does not go to
25 the acts and conduct of the Accused as charged in the indictment.

26
27 In accordance with previous decisions from the Appeals Chamber in *Galić* on 7 June 2002 and from the
28 Trial Chamber in *Nsabimana* on 15th September 2006, the Chamber finds that evidence --
29 the Accused's state of mind must be considered evidence on his or her acts and conduct as charged in
30 the indictment. The disputed portions of the witness statements are, therefore, not admissible.

31
32 Accordingly, the Chamber admits into evidence under seal the written statements from
33 Witnesses D1 and D12 and subject to the Defence deleting the aforementioned portions of the
34 statements from Witnesses D2 to D5, D7 to D11 and D13.

35
36 The Defence shall file the admitted statements as directed by close of business today. This was the
37 decision.

1 There is a further issue concerning the admission of evidence, namely, annex A to the motion of the
2 joint statement concerning Mr. Bagaragaza's cooperation with the Prosecution.

3
4 I understand there was a dispute concerning footnote 1 in that statement. I further understand that the
5 issue has been discussed between the parties.

6
7 So what are the suggestions from the parties with respect to this exhibit?

8 MR. KNOOPS:

9 Your Honour, in light of the discussions yesterday, informal discussions, we, as Defence, hold the view
10 that the terminology that is mentioned in annex A is permissible with the caveat that we are willing to
11 admit that this is, of course, the terminology used by the Prosecution as mentioned yesterday during
12 our discussions.

13
14 So it's not -- the terminology has derived from a judgement from this Court.

15 MR. PRESIDENT:

16 Well, thank you. Well, one might consider to change the wording slightly so that it says that, the last
17 sentence of paragraph 6, that is second testimony in the *Zigiranyirazo* case in November 2006 was
18 equally found complete and credible by the Prosecution and then delete the footnote.

19 MR. KNOOPS:

20 We can accept this caveat, Your Honour.

21 MR. KAPAYA:

22 Yes, Your Honour. I think the caveat solves the problem. Otherwise, we cannot agree on something
23 which might be contrary to a Trial Chamber decision.

24 MR. PRESIDENT:

25 Thank you. That settles the matter. So we will admit annex A into evidence as well. Under seal? Is
26 that necessary?

27 MR. KNOOPS:

28 It's not necessary for the Defence, Your Honour.

29 MR. PRESIDENT:

30 Very well. That solves the problem because then we can attach it to the judgement. We will admit it as
31 a public document.

32

33 Mr. Registrar, what will be the exhibit numbers of the exhibits?

34 MR. TUMATI:

35 This will be D. 1.

36 MR. PRESIDENT:

37 No. We already have D. 1. We have the first ten exhibits. We have 12 exhibits which are

1 witness statements. Count them. I wonder whether we could use annex A to fill the gap between
2 Exhibits 5 and 6 so that we have forth running numbers and the parties can refer to the numbers that
3 have already been put on the exhibits by the Defence.

4
5 So see if you can find out.

6 (*Exhibit No. D. 6 admitted*)

7 MR. PRESIDENT:

8 I also note to the record that the Defence has withdrawn the remaining exhibits that were previously
9 tendered for admission.

10
11 Are there any other matters to be discussed before we embark on the closing arguments?

12 MR. JORDASH:

13 Annex B, Your Honours, from the same document.

14 MR. PRESIDENT:

15 Well, it seems to be more than the character of the arguments of the Defence rather than agreed facts.

16 MR. JORDASH:

17 Well, in light of -- there's two portions of annex B, paragraphs 10 to 13, which deal with pure mitigation.
18 And as we understand the Prosecution's position, vis-à-vis, the 92 *bis* statement, they now accept this
19 falls squarely into mitigation. And as we understand their position, they do not oppose that mitigation.
20 Nope. I'm getting a shaking of the head from Mr. Kapaya. But that was our understanding.

21
22 And in relation to paragraphs 14 to 16, we will be making submissions on these points, and we will ask
23 Your Honours to take them into account. So I'm raising this because it might be easier to simply exhibit
24 them and then Your Honours take whatever weight from them as Your Honours consider fit.

25 MR. KAPAYA:

26 Your Honour, our position as regards to annex B is that it's inconsistent with the guilty plea agreement
27 and it's inconsistent with the paragraphs in the indictment. It raises a defence to the Accused's actions
28 and conduct. And that's the basis of our objection.

29
30 Further, the contents of annex B mirror very closely to the contents of the statements D1 to D13.

31 Arguably, they are an extraction of some of the facts on those statements, and then they are put here.
32 So our objections to 92 *bis* in relation to the statements on this also cover the contents of these
33 statements.

34
35 However, as these are not 92 *bis* applications, our objections are simply on the grounds that they run
36 counter to them. They are inconsistent with the guilty plea agreement.

1 MR. JORDASH:

2 Only that I would urge the Prosecution to look at paragraphs 10 to 13 which have nothing to do with our
3 discussion in relation to the acts and conduct and couldn't conceivably amount to a defence. They are
4 simply issues relating to what we say was the character of the Accused prior to the event. That's
5 paragraph 10 to 13.

6

7 14 to 16 -- we agree they are a summary of what the statements say, but they're a summary of what we
8 will submit in mitigation. We don't -- we know that that's not accepted by the Prosecution. But
9 nonetheless, we put it before Your Honours for Your Honours' consideration and weighing.

10 MR. PRESIDENT:

11 Yes. We have the document in our bundle, and it might facilitate our deliberations and the
12 judgement writing. But I don't think it qualifies as an exhibit to be admitted into evidence. It's not
13 evidence. It's, more or less, your summing up of your points. But we have the document here, and we
14 have already read it and will refer to it and go back to it to the extent we find it useful.

15 MR. JORDASH:

16 I'm grateful for the indication. Thank you.

17 MR. PRESIDENT:

18 Concerning the issue that was raised whether or not the Defence may refer to particular circumstances,
19 it follows from our oral ruling that the Defence may not rely on the 92 *bis* statements or the portions of
20 the 92 *bis* statements that have not been admitted into evidence. But otherwise, they are not bound or
21 prevented from developing on the issue of what motivation and what might have motivated
22 Mr. Bagaragaza to act as he did considering his personal status and other issues.

23

24 So this means that we have reached the point where I can give the floor to the Prosecutor to start with
25 his closing arguments.

26

27 Mr. Prosecutor.

28 MR. KAPAYA:

29 Your Honour, I would have preferred, perhaps -- because the issues relate to sentencing and it's in the
30 interest of the Defence that a sentence of a certain magnitude be made by Your Honours. So I thought
31 the Defence would start, and then we would respond subject to your further deliberations, Your Honour.

32 MR. PRESIDENT:

33 Usually it's the other way around, the Prosecution asking for a severe sentence and the Defence who
34 counters it. But if the parties agree on another order, it's --

35 MR. JORDASH:

36 We don't agree. We're not sure what the Prosecution's position is going to be in relation to some of
37 these issues, and we'd like to hear what their position is before setting out our own. Thank you.

1 MR. PRESIDENT:

2 Yes. So the floor is yours, Mr. Prosecutor.

3 MR. KAPAYA:

4 Thank you, Your Honour.

5

6 Your Honour, following intense and protected negotiations between the Accused and the Prosecutor
7 stretching as far back as 2004, the parties finally reached a plea agreement in August this year, and the
8 plea was confirmed by Your Lordships on the 17th of September 2009.

9

10 Your Honours, you're aware that Michel Bagaragaza pleaded guilty to complicity in genocide. The acts
11 of the Accused which formed the basis of the guilty plea included stocking weapons in the
12 Nyabihu tea factory in Gisenyi which were used to kill Tutsi during 1994; supplying vehicles and fuel to
13 members of the *Interahamwe* who killed hundreds of members of the Tutsi ethnic group who had
14 sought refuge at Kesho hill and at the Nyundo cathedral between the 8th and 3rd of April 1994;
15 supplying stuff from the Rubaya and Nyabihu tea factories who participated in attacks on members of
16 the Tutsi ethnic group who had sought refuge at Kesho hill and Nyundo cathedral; and providing money
17 to buy drinks to members of the *Interahamwe* militia as an incentive to kill members of the
18 Tutsi ethnic group in Giciye and Karago *communes* in the Gisenyi *préfecture* in April 1994.

19

20 Your Honours, in determining the appropriate sentence, the Chamber is enjoined by Article 23(2) of the
21 Statutes of the Tribunal and Rule 100(A) of the rules to consider, among other things, the gravity of the
22 offence, the individual circumstances of the Accused, aggravating and mitigating circumstances,
23 including substantial cooperation with the Prosecutor by the convicted person before or after conviction.

24

25 Your Honour, the Chamber is invited further to consider that the Security Council, pursuant to
26 Article 39 and Chapter VII of the United Nations Charter established the Tribunal to ensure an effective
27 redress of violations of international humanitarian law in Rwanda in 1994. The objective, Your Honour,
28 was to prosecute and punish the perpetrators of the atrocities in Rwanda in such a way as to put an
29 end to impunity and promote national reconciliation and a restoration of peace.

30

31 As to gravity of the offence, the Chamber is invited to consider that the object of making
32 criminal complicity in genocide is to reach those who plan, organise, or otherwise encourage genocide
33 but who never actually wield machines or machetes, are rarely at the crime scenes but participate in
34 these crimes from comfortable offices far away and out of sight.

35

36 The Chamber is invited to weigh these considerations in the context of Rule 62 *bis* (A)(ii) wherein the
37 parties in this case have submitted a specific sentencing range to consider in deciding on the

1 appropriate sentence.

2
3 In this regard, the Prosecution confirms, as stipulated in the guilty plea agreement dated
4 15th August 2009 in annex A to the joint Prosecution and Defence motion on agreed facts with
5 confidential annexes A and B, dated 3rd November 2009, that Michel Bagaragaza has extended
6 substantial cooperation and invaluable information to the Prosecutor.

7
8 The Prosecutor requests the Trial Chamber to regard as a significant mitigating factor, not only the
9 substantial cooperation so far extended, but also the future possible cooperation.

10
11 Your Honours, Michel Bagaragaza's cooperation agreement is spelled out in an agreement signed
12 between him and the Prosecutor on 19th December 2004 in which the Prosecutor guaranteed the
13 safety of the Accused and his family on account of the risks to their personal security because of his
14 cooperation.

15
16 The Accused has expressed his intention -- the Accused had expressed his intention to plead guilty
17 immediately upon his voluntarily surrender to the Tribunal on 15th August 2005.

18
19 I agree with the findings in the documents I've mentioned that Michel Bagaragaza's guilty plea is a
20 signal of his remorse, repentance, and acceptance of responsibility for his actions.

21
22 And finally, I submit to Your Honours that the mitigation of punishment does not in any way reduce the
23 degree of the crime. The degree of magnitude of the crime is still an essential criterion in evaluation of
24 sentence. A sentence must reflect the predominant standard of proportionality between the gravity of
25 the offence and the degree of responsibility of the accused person.

26
27 Just sentences contribute to respect for the law and the maintenance of just, peaceful, and safe society.

28
29 That's all, My Lords.

30 MR. PRESIDENT:

31 Thank you, Mr. Kapaya.

32
33 The Defence.

34 MR. JORDASH:

35 Thank you, Your Honours. The jurisprudence of the international tribunal suggests that the main
36 objectives of sentencing are usually deterrence and retribution. Rehabilitation, whilst relevant, is
37 generally given lesser weight.

1 However, the Chamber has a wide discretion in considering, weighing, and determining all relevant
2 circumstances, including which objectives ought to be paramount in a particular sentencing exercise.
3

4 We submit that in the present case the Chamber ought to elevate the objective of rehabilitation,
5 collective rehabilitation, to be a significant, if not the most significant, sentencing objective.
6

7 And we say that for these reasons, the reasons that I will outline followed by my learned friend,
8 Mr. Knoops. We say it because, bearing in mind the gravity of the offence, the lack of aggravating
9 features as accepted by the Prosecution, and the, we submit, exceptional cooperation and other
10 mitigating factors in this case, collective rehabilitation has a huge significance.
11

12 We submit that the Accused, the convicted person, has done everything he can since this dreadful
13 offence to apologise, show his genuine remorse, cooperate, and assist with the Prosecution and, in
14 doing so, has set himself on a path of contributing, as much as he can, to the process of
15 national reconciliation and to the restoration and maintenance of peace. And we submit the Chamber
16 should take that into account as the most significant factor in the sentencing exercise.
17

18 We submit that a sentence of six years would be appropriate in this case and would send a powerful
19 message to those such as Mr. Bagaragaza or such as those considering to take the steps that
20 Mr. Bagaragaza took; that it is in their interests to do so and it is in the interests, more importantly, of
21 that process of national reconciliation.
22

23 We highlight -- and my learned friend, Mr. Knoops, will detail -- the very real problems in the
24 Hutu diaspora, the very real anger and bitterness towards Mr. Bagaragaza for his contribution to this
25 prosecution and to the prosecutions in general.
26

27 And we note that that in itself is an indication of the very real need for the people such as
28 Mr. Bagaragaza to act as he did. And we submit for Trial Chambers to recognise the significance of
29 that.
30

31 We acknowledge, of course, that a primary sentencing consideration is the gravity of the offence
32 committed by the Accused. As held by the ICTY Appeals Chamber in Celebici, gravity is, by far, the
33 most important consideration which may be regarded as the litmus test for the appropriate sentence.
34

35 It requires, as Your Honours know, a consideration of the particular circumstances of the case as well
36 as the form and degree of participation of the Accused in the crime.
37

1 If I can briefly refer you to the amended indictment, paragraph 9 particularly and paragraphs 10 and 11,
2 which sets out what it is Mr. Bagaragaza has pleaded to.

3
4 On the 8th of April 1994, Mr. Bagaragaza, as Your Honours can see, was privy to a discussion. And
5 following that discussion, he authorised the use of factory items. And in doing so, without awareness,
6 contributed to the perpetrators' acts.

7
8 A dreadful decision, a disgraceful decision, but, nonetheless, a decision which was a momentary
9 weakness culpable. But we ask the Trial Chamber to take into account the circumstances.

10
11 Kuradusenge, the chief of *Interahamwe*, had already taken tyres from the factory. Mr. Bagaragaza
12 knew that the *Interahamwe* were close by and were already at the killing site.

13
14 When asked under those circumstances, he authorised the further taking of items from the factory. A
15 rejection of his responsibilities we accept, but we urge the Trial Chamber to see that in the
16 circumstances at the time there is an explanation that a man who, if Your Honours accept -- and we
17 urge you to accept -- had a non-discriminatory approach but, faced with the violence of the
18 *Interahamwe*, made that decision in that context.

19
20 There were two or three more decisions, and Mr. Bagaragaza's culpability amounts to those
21 four maximum decisions, the one on the 8th of April and then two or three decisions when the
22 *Interahamwe* came to his house seeking money for alcohol.

23
24 Mr. Bagaragaza's family were in his house. The *Interahamwe* knew he had money and alcohol in his
25 house because of the preparations for his brother's wedding. Mr. Bagaragaza made, again,
26 disgraceful decisions. He did have a choice. But nonetheless, the choice was circumscribed by the
27 fear he felt that the *Interahamwe* might enter the house and might attack his family.

28
29 You heard from the witness yesterday as to the steps Mr. Bagaragaza had to take to protect his own
30 family. And we urge the Trial Chamber to consider that many prominent people in that region formed
31 the genocidal intent. Most prominent people in that region formed the genocidal intent.

32 Mr. Bagaragaza did not.

33
34 These decisions were wrong. We do not move from that. But his participation was remote, we submit,
35 could not have been more indirect. It is telling, we submit, and significant that Mr. Bagaragaza was at
36 home over that period. Unlike many of the other prominent men, it is significant that he remained at
37 home to protect his family rather than setting out with enthusiasm in a proactive way to pursue the

1 genocide.

2
3 We also urge you to accept what the witness also referred to yesterday about
4 Mr. Bagaragaza's children not being permitted to join in the genocide. They were in the house being
5 protected by Mr. Bagaragaza.

6
7 We would urge Your Honours to look at the case of Pastor Elizaphan Ntakirutimana -- excuse my
8 pronunciation -- convicted of genocide after a contested fight, five occasions of proactive driving of
9 *Interahamwe*, removing the roof of a church to allow Tutsis to be killed, aggravated factors found which
10 concerned primarily the abuse of his authority and position mitigated, as in this case, by age and health
11 but also in that case mitigated by his service prior to the event.

12
13 In all respects, we submit, this case is deserving of a lower sentence. And in that case the
14 pastor received a ten-year sentence. Many of the mitigating factors present here were not present
15 there and no aggravating factors present in this case.

16
17 And that's why we submit it is important that Your Honours take into account the history of
18 non-discrimination showed by Mr. Bagaragaza because that, in our submission, is analogous to the
19 service found by the Trial Chamber in that particular case. But in all other respects, Mr. Bagaragaza
20 can rely on aspects, mitigating aspects, which ought to bring his sentence, we say, to six years or
21 thereabouts.

22
23 If I can move to the mitigation, we say there are eight principal mitigating factors in this case. One is
24 Mr. Bagaragaza's full cooperation with the Prosecution; two, and a related mitigating factor, his
25 guilty plea resulting in count A, a huge contribution to reconciliation; three, his voluntary surrender to
26 the Tribunal; four, his good character and absence of prior convictions and the absence of
27 discriminatory behaviour on his part prior to the event. We add to that his reputation, which we submit
28 was of a moderate nature as detailed by D6; his good conduct in detention; his remorse; and his age
29 and ill health.

30
31 We submit these are powerful mitigating factors which, going back to what I submitted earlier, as a
32 package demonstrate that Mr. Bagaragaza has done everything he could since the offence to try in his
33 small way to make amends.

34
35 We submit that his conduct prior to the events was not simply limited to the fact he had a
36 non-discriminatory manner as reflected by having a driver who was Tutsi or having a mistress who was
37 Tutsi.

1 Your Honours may think that many accused at this Court have exactly the same and can rely upon
2 token examples of such non-discriminatory behaviour.

3
4 But in our case, in Mr. Bagaragaza's case, it goes much further than that. And we urge Your Honours
5 to look at the various statements -- in particular, D7, D9, D5, and D3 -- which go much further than
6 Mr. Bagaragaza having some elements of non-discriminatory behaviour but show that at the
7 critical time, prior to the genocide, Mr. Bagaragaza had 50 per cent employees in his department who
8 were Tutsi, not in lowly unimportant jobs but in high managerial jobs.

9
10 Mr. Bagaragaza not only didn't discriminate, but he, in the prevailing circumstances, positively
11 discriminated in favour of Tutsis. Where there was an unofficial policy in other companies of a
12 10 per cent Tutsi employee proportion, percentage, in Mr. Bagaragaza's factory, in his department, he
13 made sure there was a 50 per cent.

14
15 Perhaps I should also deal quickly with a query that arose yesterday in relation to D6's evidence and
16 what happened to Mr. Bagaragaza's Tutsi mistress.

17
18 At the time when he was protecting his legal family, his brother was protecting his Tutsi family. They
19 were, at the time of these events, in Gisenyi being protected by his brother who was in the military, and
20 it was much safer for that family to be living there than it was in the house where he was residing in
21 those days in April 1994.

22
23 Those children are alive. The woman in question is alive and has given a witness statement you'll find
24 at D4. One of the children from that marriage is living with his legal family. The other child is in
25 Rwanda. But in every respect, they are an integrated family. No discrimination is made by
26 Mr. Bagaragaza, no discrimination before the events and no discrimination now.

27
28 Mr. Bagaragaza, we submit, stands out as somebody, when regionalism and tribalism existed in his
29 locality, as somebody who refused to give in to those unfortunate feelings. And this is the
30 good character, we submit, which underpins his subsequent behaviour, his reputation for being
31 moderate, a humble man, a hard-working man as you heard from yesterday.

32
33 We urge Your Honours to accept that prison for Mr. Bagaragaza is a more difficult prospect and has
34 been a more difficult prospect than it is for most. Mr. Bagaragaza was arrested on the
35 16th of August 2005 after voluntary surrender.

36
37 Your Honours are familiar, I'm sure, with the history of his various attempts to be tried in various

1 jurisdictions, but to cut it short, on the 7th of May 2007, he moved to a Dutch prison where the idea was
2 that he would be tried under Dutch law.

3
4 The point I wish to make is this, that that move meant he spent 23 hours in solitary confinement from
5 the 7th of May 2007 until May 2008 when he moved to Arusha. And he has been in
6 solitary confinement ever since. The reason for that is because of the security concerns which arise
7 because of his cooperation.

8
9 One of the reasons we urge the six-year sentence is because that solitary confinement will continue,
10 because of security concerns, as long as he in Arusha. We submit a sentence which entails
11 solitary confinement, for his own security, is much, much more difficult than a normal prison sentence.
12 And that's why we submit, amongst other factors, that six years would be an appropriate sentence.

13
14 Notwithstanding the difficulties of that incarceration, Mr. Bagaragaza has not wavered once in his
15 remorse. And more importantly than his expression of remorse is his actions reflecting his remorse.
16 Not once has he, despite those difficulties, ever moved from that path.

17
18 And I will pass over to Mr. Knoops to deal with that cooperation.

19
20 Thank you, Your Honours.

21 MR. KNOOPS:

22 Thank you, Your Honours.

23
24 Your Honours, we teach our students that, at least my students -- we teach our students that
25 cooperation is at the very heart of the operation and functioning of international criminal tribunals, and
26 that's rightly so. Without states giving cooperation, without individuals giving cooperation,
27 international criminal courts cannot function.

28
29 Therefore, I think it's paramount for this Tribunal to be aware of the level and degree of cooperation this
30 Defendant gave to the functioning of this Tribunal.

31
32 We have here a man before you, Your Honours, with, in general, no discriminatory intent, feelings,
33 attitudes towards ethnicity, a man who voluntarily surrendered, a man who voluntarily pleaded guilty to
34 complicity to killing Tutsis, and a man who subsequently voluntarily cooperated with this Court as of
35 2004 after, by the way, giving a 400-plus statement without counsel being present.

36
37 And I think I can stress not enough that Mr. Bagaragaza, at the time of his statement, waived his rights

1 for counsel to be present simply because he had nothing to hide from the Prosecution or the
2 international community, which clearly shows his sincerity in the statements he gave to the Prosecution
3 in 2004.

4
5 It was a conscious decision of a man who was aware that he made a wrong choice in his life in those
6 dark days of July 1994; a wrong choice he deeply regrets; a wrong choice which had grave
7 consequences, primarily, yes, for his own people but also for himself and his family; a wrong choice he
8 has to carry with him for the rest of his life; a wrong choice he cannot forgive himself, but he can ask
9 you, Your Honours and the international community, for forgiveness.

10
11 And, Your Honours, we believe he's entitled to a form of forgiveness, to a degree of mitigation. Led by
12 sincere remorse, Michel Bagaragaza endeavoured a formidable effort, really formidable, in order to
13 cooperate with the Prosecution in order to redress, to rectify, the consequences of his wrong choice in
14 his life.

15
16 He did virtually everything that at that time was still within his power to rectify the consequences of his
17 wrong choice. Most prominently, Your Honours, there is his unprecedented cooperation with this
18 Tribunal and thus the international community.

19
20 His remorse led to a degree of cooperation which substantially contributed to the truth-finding process
21 before this Court and thus advanced the overall gains and goals of collective national and
22 international reconciliation.

23
24 Collective reconciliation is a term which we can find in the Security Council Resolution 955 of
25 1994 creating the ICTR whereby it's referred to contribution to national reconciliation where it's
26 apparent that it also reflects on international reconciliation.

27
28 Your Honours, I just mentioned the qualification unprecedented, indeed unprecedented in terms of
29 degree, magnitude, to use a term of the Prosecution when it's qualifying the crimes. But I am using it
30 now to qualify the degree of cooperation, the degree and magnitude which was unprecedented before
31 this Tribunal.

32
33 And did it contribute to the truth-finding process before this Court? Indeed, Your Honours.

34 Your Honours were presented yesterday with a bundle with several judgments. For the most part,
35 those attachments you'll find as annex A a decision or joint motion of Prosecution-Defence filed
36 in February 2008, which motion is part of the case file of Michel Bagaragaza before this Tribunal. And
37 attached to this motion you'll find as annex 1 an affidavit of one of the investigators of this Tribunal in

1 which he gave a detailed account of the level of Prosecution of Michel Bagaragaza and the
2 consequences thereof, not only for the Court but also for him, Bagaragaza, as a person.

3
4 And I've only one request to the Court, to briefly look at page 2 whereby it is mentioned in paragraph 3
5 under 2, "He voluntarily agreed to testify in various ongoing and upcoming trials in which *Akazu*
6 members were and are implicated thereby contributing to the establishment of the truth in court with the
7 aim of promoting reconciliation in Rwanda."

8
9 Therefore, we are legitimised to say that his degree and type of cooperation did contribute to the
10 fact-finding process and truth-finding process before this Court.

11
12 Now, can we say that indeed, as laid out before, his form of cooperation was unprecedented? Indeed
13 we are entitled to say so as Defence. Your Honours have before you various types of evidence which
14 give an account of this unprecedented form of cooperation.

15
16 First of all, annex A, now being qualified as Exhibit D. 6, if I recall well, which annex is predominantly
17 based and drawn upon a statement we, as Defence, received from the former chief of Prosecutions of
18 this Tribunal, Mr. Stephen Rapp.

19
20 Mr. Rapp and I -- we were involved in this case as of November 2004 till he got another position. So I
21 think I'm entitled to say that the account given in annex A, Exhibit D. 6, based upon predominantly a
22 statement of Mr. Rapp, was, indeed, also a reflection of the reality we, the Defence and the
23 Prosecution, experienced.

24
25 Simply, paragraphs 1 and 2 of annex A, Exhibit D. 6, already qualify the unprecedented type of
26 cooperation by using the terms, the terminology, "great value," "full and complete cooperation."

27
28 And it uses twice the term "credible" to which we now agree that it's credible from the prospective of the
29 Prosecution. I draw the attention that the term "credible" is especially used in the context of two types
30 since of June and November 2006 in one of your other cases before this Tribunal.

31
32 Unprecedented also for a second reason, Your Honours, namely, that the cooperation of
33 Michel Bagaragaza with this Tribunal -- I'm not saying only with the Prosecution. It's with the Court in
34 its totality because his cooperation has served the Court, cooperation based on a voluntary surrender.

35
36 My learned friend, Mr. Jordash, already alluded to this element, and I refer Your Honours to the
37 *Rutaganira* judgement of 14 March 2005, paragraph 145, in which the Court clearly stipulated that a

1 voluntary surrender is a mitigating factor since it reflects respect for the international administration of
2 justice.

3
4 And we believe that the voluntarily surrender of Michel Bagaragaza, as part of his overall cooperation,
5 does, indeed, reflect his respect for the international criminal justice system.

6
7 Your Honour, the term "unprecedented" can also be advanced from another perspective, namely, from
8 the perspective of the consequences for Mr. Bagaragaza. Or maybe I can better formulate my side by
9 saying that, in spite of circumstances and consequences, his cooperation still remains unprecedented.

10
11 And when we delve into the consequences of his unprecedented cooperation, again, the evidence
12 before Your Honours is self-evident. First and foremost, again, Exhibit D. 6, annex A, whereby it's
13 stipulated that Mr. Bagaragaza's cooperation in the major case before this Tribunal was left untouched
14 by him despite a violation of the agreement, the cooperation agreement, of December 2004.

15
16 I'm not referring to the term "violation" as referring to blameworthiness. I'm just simply stipulating that,
17 from an objective point of view, Mr. Bagaragaza did something he was not obliged to do on the basis of
18 the cooperation agreement of December 2004 simply because it was stipulated that his testimony, in
19 cases before this Court, would be administered from a country outside Africa.

20
21 Despite that disappointment, despite that ruling by the Appeals Chamber in that case overturning the
22 Trial Chamber's decision that Mr. Bagaragaza could testify through a video link from Camp Zeist in the
23 Netherlands, despite that ruling, Mr. Bagaragaza kept his word with this Court and testified in
24 open session in November 2006 with disclosure of his full identity.

25
26 And we should acknowledge that, despite the deviation from that cooperation agreement
27 of December 2004, his cooperation remained, as quoted from annex A, Exhibit D. 6, equally complete
28 and credible from the perspective of the Prosecution as the caveat stands.

29 *(Pages 1 to 15 by Kelly Surina)*

1 1500H

2 MR. KNOOPS (*continued*):

3 Your Honours, speaking about the unprecedented cooperation in terms of consequences for
4 Mr. Bagaragaza, I arrive at a second point. The same annex, A, Exhibit D. 6, reveals that, as
5 my learned friend, Mr. Jordash, already referred to, the transfer agreement as being part and parcel of
6 the December 2004 agreement. The transfer agreement was not realised due to circumstances outside
7 the control of Mr. Bagaragaza. The transfer to Norway and subsequently to the Netherlands was
8 rejected due to legal reasons outside the control, as mentioned, of Mr. Bagaragaza, which led to a
9 severe disappointment, because this was for him quite essential for his cooperation. But, nonetheless,
10 despite these two disappointments, he kept his word and kept cooperating in the full and complete
11 manner, as we came to know this man from 2004.

12
13 And in the third place, it's justified to speak about an unprecedented way of cooperation of
14 Michel Bagaragaza with this Court -- is the observation, as evidenced by also Exhibit D. 6, that he and
15 his family was severely subjected to a hate campaign, which can qualify as a criminal action. Because
16 if you look in the way he and his family was approached through the Internet and was threatened,
17 threatened in every sense of the word, it's not superfluous to speak about a criminal way of
18 approaching people.

19
20 Paragraph 7 and 8 of Exhibit D. 6 reflect the severity of the hate campaign he and his family was
21 subjected to. A few key words: Revenge, elimination of him and his family, a very dangerous situation,
22 isolation. He's at high risk. You will find all these terms in annex A, Exhibit D. 6. And these are not
23 inventions of the Defence. This -- these are facts of life, acknowledged by the Prosecution and also
24 seen by everyone on the Internet.

25
26 The Internet sites, which form a reflection of this severe hate campaign, this criminal hate campaign,
27 are also evidenced by the Exhibits D. 1, D. 5, D. 13 insofar as they relate to these references.

28 Paragraph 8 of annex A, Exhibit D. 6 refers to his statements -- Mr. Bagaragaza's statement of 2004,
29 which was, in its totality, with disclosure of his full identity, put on Internet shortly after he gave that
30 statement. You will find it in paragraph 8. Still, despite the violation of the order of this Court that that
31 statement would not have to be disclosed at that time, Mr. Bagaragaza kept his word and maintained
32 his position as a cooperative defendant.

33
34 In the fourth place, speaking about the unprecedented consequences of his cooperation, Your Honours
35 find in the mentioned affidavit of one of the Prosecution investigators, annex 1 to our
36 document number A of the bundle of yesterday -- you'll find in the paragraphs -- sorry -- the
37 pages 5 till 8 a detailed account given by this investigator of the threats and the implications of those

1 Internet threats.

2
3 And lastly, in the fifth place, speaking about the unprecedented consequences of
4 Michel Bagaragaza's cooperation with the Court, yes, I can say against all odds -- against all odds he
5 cooperated, against all odds because he was in the solitary confinement in the Netherlands.
6 My learned friend, Mr. Jordash, referred to it actually in violation with the UN detention rules because
7 the confinement he underwent in the Netherlands was far more restricted than the confinement or the
8 detention conditions under the
9 UN regime.

10
11 For almost a year he spent his life in a prison in the Netherlands, the only African individual there,
12 23 hours behind the door. And when we, as Defence, visited him there, he never complained. He
13 accepted his fate. He never complained about his -- the circumstances, but we saw him suffering. We
14 were there as Defence -- that despite these setbacks, against all odds, Mr. Bagaragaza remained a
15 man of principles. He was not disencouraged (*sic*) from cooperating with the Court against all odds.

16
17 From November 2005, when I was assigned as counsel for Mr. Bagaragaza till today, almost
18 four years, I became to know him as a man of principles, as a Defendant for which a word is a word.
19 Your Honours, what can't a man sacrifice more to show remorse and redress a wrong choice he made
20 in his life than a degree of cooperation with the international criminal justice system, such that it is --
21 that he is even willing to sacrifice his own life and that of his family, because that is the reality. He knew
22 the consequences of his cooperation with the Court. Still he was willing to accept that fate because of
23 his remorse, his incentive to redress the wrongdoing he did within his powers and within his remaining
24 capacities. It is telling, Your Honours, that Mr. Bagaragaza was and is willing to sacrifice his life for this
25 type of cooperation. What can a man possibly do more to sacrifice this in order to redress the
26 wrongdoing and to show remorse.

27
28 Your Honours, I arrive at my conclusions. I know that making analogies is always difficult. That is also
29 what we teach law students. No case can be compared to another case. That's why sentencing
30 factors, as set out by this Court, should be determined on a case-by-case basis. That is the case law.

31
32 Your Honours have a wide range of discretionary power to stay within those factors but also go beyond
33 those factors on the basis of exceptional circumstances. And a reflection of that case law you'll find in
34 the *Kambanda* Appeals Chamber judgement of October 2000, paragraph 124 and the
35 *Jelisić* Appeals Chamber judgement of 5 July 2001, paragraph 101. We submit that we're dealing here
36 with a case and an individual which justified the terminology of exceptional circumstances.

1 Now, speaking about making analogies -- and I think there are two cases I would like to bring to the
2 attention of Your Honours before closing our submissions -- that's -- the first one is a case which was
3 dealt with by the ICTY, the *Plavšić* case, Biljana Plavšić, who ultimately pleaded guilty, got 11 years for
4 an indicted period of 18 months, July 2001, December 2002. And it follows from this judgement --
5 which was rendered, by the way, on the 27th February 2003, *Prosecutor versus Krajišnik*. It follows
6 from this sentencing judgement that a convicted person ought to receive a considerable reduction in
7 sentence in recognition of a valuable contribution to the furtherance of the process of
8 national reconciliation and to the restoration and maintenance of peace, notwithstanding, I should say,
9 the commission of grave crimes.

10
11 As in the *Plavšić* case, Your Honours, the Chamber in that case recognised that the convicted
12 person's conduct could be a mitigating factor, because in that situation, after the cessation of hostilities,
13 she demonstrated considerable support to the peace process. The Chamber noted in that case other
14 activities of the accused person in furtherance of peace and reconciliation and accepted the
15 submissions of the defence that these activities of the defendant were conducted under difficult
16 circumstances and risks in which she, Mr. *Plavšić* -- Ms. *Plavšić* manifested courage.

17
18 I submit to you that under the circumstances, as we just lay out, the unprecedented way of cooperation,
19 despite the consequences of that cooperation, is justified to say that Mr. Bagaragaza gave that
20 cooperation under difficult circumstances and risks for his life and that of his family and demonstrated
21 courage, courage not only to the Court but also and mainly to his own people. And the Chamber,
22 therefore, attached significant weight to that factor in mitigating the sentence. That's, I think, for this
23 moment, the crux of the *Plavšić* sentencing judgement of February 2003.

24
25 And a second example by way of analogy may be found in the ICTY Trial Chamber's trial judgements of
26 5 March 1998, whereby, in the case of *Prosecutor further -- versus Erdemović*, it was noted by the
27 judges in their sentencing considerations that a host of mitigating factors were applicable there, various
28 mitigating factors were applicable there. But most -- and I think foremost -- we emphasise the
29 observation of the trial chamber in that case that the Defendant was a good candidate for rehabilitation
30 because he had a series of traits characterising a gradual personality, paragraph 111 of the
31 trial judgement in *Erdemović*. And as Your Honours know, Mr. Erdemović was ultimately convicted to
32 five years' imprisonment on the basis of an indictment which covered the time span of about ten days,
33 which is more or less comparable to the situation of Mr. Bagaragaza's indictment.

34
35 Your Honours, deterrence, retribution, not revenge or vengeance, would be misplaced here, if the
36 emphasis would be on deterrence and retribution. With my learned friend, Mr. Jordash, we submit and
37 conclude that, on the basis of the various mitigating factors we were able to demonstrate to the Court

1 and which are also part and parcel of Exhibit D. 6, we submit that Mr. Bagaragaza is a person who
2 qualifies a standard as set out by the ICTY in the *Erdemović* case as being a good candidate for
3 rehabilitation because of his character, his personality, and the other circumstances of the situation
4 and, therefore, is eligible for being a corrigible personality. This concludes my submissions,
5 Your Honour.

6 MR. PRESIDENT:

7 Thank you, Mr. Knoops.

8

9 Do you wish a reply?

10 MR. KAPAYA:

11 No. No, Your Honour, because what he has said is basically what we, Prosecution, submitted in -- in
12 brief.

13 MR. PRESIDENT:

14 Thank you.

15

16 The Defence has requested that Mr. Bagaragaza be allowed to address the Court.

17

18 Mr. Bagaragaza, will you please take the stand.

19

20 Yes. Please sit down, Mr. Bagaragaza.

21

22 So what the Defence intends to ask Mr. Bagaragaza will amount to evidence. It's a matter of whether
23 he should be sworn in or not.

24 MR. KNOOPS:

25 Your Honours, Mr. Bagaragaza is not as a witness in this witness box. But we leave it in the hands of
26 the Court to determine the value of his closing words. It's more personal words he would like to
27 address to the Court.

28

29 And we have, for Your Honours, made a copy of his statement, which we would like to submit as part of
30 our closing arguments.

31 MR. PRESIDENT:

32 Very well.

33

34 I think, just to be on the safe side, Mr. Bagaragaza, I will admonish you to tell the truth while you give
35 your statement. You have the floor.

36 THE WITNESS:

37 Thank you, Mr. President. Mr. President, Your Honours, by all reports the Rwandan genocide caused

1 the deaths of more than 800,000 victims. Everyone knows that it is difficult to measure the
2 repercussions of this calamity.

3
4 The social fabric of our country was torn apart, and the recurring consequences continue to persist
5 today. The wounds were so deep that we must do all in our power to attempt to initiate reconciliation
6 among Rwandans. That was the substance of my modest clab -- cooperation with
7 international justice.

8
9 Your Honours, let me assert that I do not regret the choice I made, that of cooperating with
10 international justice. I merely hope that my humble and modest contribution turn out to be somewhat
11 useful.

12
13 Allow me to state that the Rwandan tragedy, the genocide, is one of its kind. It caused a great deal of
14 loss in terms of human lives, forced part of the population into exile, and it has caused considerable
15 suffering and of all kinds. That is the purpose of my confession.

16
17 I informed the investigators of the Tribunal that I would commit myself to speaking the truth about what
18 they want to know, including information about myself. I kept my word. In respect of myself, I informed
19 the Tribunal that I would speak about my role, which I sincerely regret, and that the professionals in law,
20 in the persons of the Judges and the lawyers, will take it upon themselves to interpret the offence,
21 which I regret, I admit to, and accept. And this is taking into account the provisions of the law.

22
23 That was my admission. My admission was my expression of the trust that I have in justice, in the
24 course of justice. I did this in good faith in the interests of justice when -- with my determination to
25 contribute better -- as best I can to a reconciliation.

26
27 The suffering of the Rwandan people deeply trouble me, and I have no words to express myself clearly.
28 But I am convinced that we have to work hard to try and heal our wounds. The Rwandan genocide,
29 which I deplore and which I find abhorrent, destroyed us. I feel this, and I will feel -- continue to feel this
30 for the rest of my life.

31
32 The period from the 7th April 1994 to the 14th of April 1994 will remain engrained in my memory. It
33 corresponds to the period of time where I made a terrible choice and opted for the easy way out during
34 difficult times. This period left me with a lot of remorse and scarring, which I have difficulty -- which
35 make me have difficulty in feeling at ease with myself.

36
37 Your Honours, from the very depths of my heart, I confess this wrong that I did, and I continue to mourn

1 the people of Rwanda and implore you to give me pardon. I thank you, Mr. President, Your Honours.

2 MR. PRESIDENT:

3 Thank you, Mr. Bagaragaza.

4

5 And this concludes the closing arguments in this case. So we adjourn until tomorrow at 3 o'clock when
6 the Chamber will deliver its sentencing judgement orally. The written decisions -- the written reasons
7 will follow hopefully in English the following week and the French as soon as possible thereafter.

8 *(Court adjourned at 1522H)*

9 *(Pages 16 to 21 by Tanya West)*

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CERTIFICATE

We, Kelly Surina and Tanya West, Official Court Reporters for the International Criminal Tribunal for Rwanda, do hereby certify that the foregoing proceedings in the above-entitled cause were taken at the time and place as stated; that it was taken in shorthand (*stenotype*) and thereafter transcribed by computer; that the foregoing pages contain a true and correct transcription of said proceedings to the best of our ability and understanding.

We further certify that we are not of counsel nor related to any of the parties to this cause and that we are in nowise interested in the result of said cause.

Kelly Surina

Tanya West